

STATE OF MAINE

BUSINESS AND CONSUMER DOCKET  
Cumberland, ss.  
Docket No. BCD-CV-11-08

STATE OF MAINE

Plaintiff,

v.

MAINEHEALTH et al.,

Defendants

CONSUMER PROTECTION DIVISION  
**RECEIVED**

MAY 26 2011

OFFICE OF ATTORNEY GENERAL

### ORDER ON MOTION TO INTERVENE

Pursuant to M.R. Civ. P. 24, Central Maine Medical Center (CMMC) has filed a Motion to Intervene as a Party In Interest in this antitrust enforcement action, on the issue whether the court should approved and adopt the proposed consent decree (hereinafter, "proposed Consent Decree") submitted by the parties.

CMMC's motion asserts that CMMC is entitled to intervene as of right, and in the alternative, argues that CMMC should be permitted to intervene. The State and the Defendants oppose the motion on both grounds.

Oral argument was held telephonically May 11, 2011, with counsel for the parties and CMMC participating.

#### *Intervention as of Right*

Rule 24(a) of the Maine Rules of Civil Procedure grants non-parties the right to intervene either by statute or because they claim an interest in the subject matter of the action and their ability to protect their interest may be impaired if not granted party status through intervention. CMMC does not claim any statutory right to intervene. It does claim that its interests as a competitor of MaineHealth will be adversely affected if the proposed consent decree is approved. However, it has not substantiated that claim with any showing that its ability to protect its interests will be adversely affected if it is not granted leave to intervene.

As the parties have pointed out, the proposed Consent Decree explicitly precludes the competitors of CMMC, MaineHealth and Maine Medical Center, from using the proposed Consent Decree to invoke "state action" immunity in any federal antitrust action against them. *See* Consent Decree section VIII(A). Moreover, neither the parties nor CMMC have brought to the court's attention any possible direct or collateral effect that the proposed Consent Decree would have on any claim or cause of action of CMMC or any other non-party to the decree. For example, a finding by the court that the proposed Consent Decree is in the public interest as provided in section VII would mean only that the court has determined it to be in the public interest for the transaction contemplated in the proposed Consent Decree to be regulated as

provided in the proposed Consent Decree, not that the transaction itself is necessarily in the public interest. Such a finding would not in any sense or to any extent generate any collateral defense against a legal or injunctive challenge by any non-party—because such a challenge might also advance the public interest by further limiting or averting any adverse impacts of the transaction on relevant markets.

Thus, as the parties interpret the proposed Consent Decree, its adoption as requested in the State's motion would not have any direct or collateral effect on any existing or prospective claim or cause of action of CMMC or any other non-party, or generate any defense to such a claim or cause of action.<sup>1</sup> It follows from that conclusion that CMMC cannot show that it is entitled to intervene as of right to protect its interests.

### *Permissive Intervention*

In the alternative, CMMC seeks to be allowed to intervene as a party in interest based on its status as a competitor of MaineHealth and Maine Medical Center in relevant areas. As the Defendants point out, however, permissive intervention in antitrust enforcement actions is exceedingly rare, if not unheard of in relevant case law. *See, e.g., Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 693 (1961).<sup>2</sup> This is because such actions are pursued in furtherance of the public interest in competition—and not for the benefit of any particular competitor. Moreover, because the Attorney General's enforcement authority is discretionary, no private party has the right to compel the Attorney General to take any particular antitrust enforcement action. It follows logically from these propositions that, as a general rule, a private party should not be permitted to intervene in an antitrust enforcement action.

The one exception to that general rule involves situations in which there is a showing that the government is acting in bad faith, otherwise committing malfeasance or failing to represent the public interest. *See* 7C Wright, Miller & Kane, *Federal Practice & Procedure* 2d, § 1909 at 429-30 (2007). No such showing has been made here.

Because CMMC's motion to intervene would, if granted, confer at least party-in-interest status on CMMC, with presumably the rights to pursue discovery and present evidence, to grant CMMC's motion to intervene would significantly shift the focus and nature of the proceeding. It would be in effect to import a private interest into an enforcement action that has its entire justification in the public interest.

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<sup>1</sup> Moreover, given that the court is denying CMMC's motion in reliance on the parties' representations that nothing in the proposed Consent Decree, if adopted, would have any direct or collateral effect on any claim of CMMC, judicial estoppel would preclude the parties from asserting in any future litigation that the court's decree incorporating the contract has any direct or collateral preclusive or limiting effect on any future claim or form of relief pursued by CMMC.

<sup>2</sup> Maine courts "look to both state and federal antitrust law for guidance in the interpretation of the Maine antitrust statute . . ." *McKinnon v. Honeywell International, Inc.*, 2009 ME 69, ¶11, 977 A.2d 420, 424.

This is not to say that the information and perspective that CMMC seeks to be allowed to present are irrelevant. Because the court is being asked to elevate what is now a contract between the Attorney General and the Defendants to the status of an enforceable judicial decree, and also to find that the adoption of the proposed Consent Decree is in the public interest, it is appropriate for the court to expect the parties to justify their assertion that approval of the proposed Consent Decree serves the public interest in terms beyond the allegations of the complaint and the motion for approval, and to permit the parties' assertions to be tested by means of public comment.

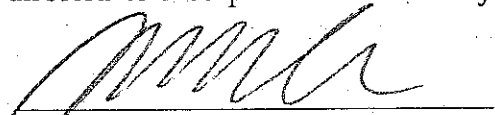
At the request of the Attorney General, the court has already issued an order soliciting comments. CMMC deliberately bypassed the comment process based on its view that only intervention would serve its purposes. CMMC also argues that there is no authority for the comment process. This may be true in terms of express statutory or rules authority, but the court has broad discretion in fashioning a process by which to determine whether approval of a consent decree is in the public interest.

Notwithstanding CMMC's decision to forgo comment during the previous process, the court is convening a non-testimonial hearing in the nature of oral argument, at which interested non-parties may present their views on whether the court should adopt the proposed Consent Decree, and whether it is in the public interest. The primary focus of the hearing will be on the State to support through argument of counsel its motion for the court to adopt the agreement, and for the Defendants to present their positions also. Nothing in the civil rules limits the court's discretion to permit non-parties to be heard on a non-testimonial motion, especially in matters of significant public concern. The procedure for the non-testimonial hearing will be defined in a separate order.

For the reasons stated, the Motion to Intervene as a Party in Interest of Central Maine Medical Center is denied.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this order by reference in the docket.

Dated 23 May 2011

  
A. M. Horton  
Justice, Superior Court